

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act of 1992)
Rate Regulation)

MM Docket Nos. 92-266
and 93-215

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RESPONSE TO RECONSIDERATION PETITIONS

Adelphia Communications Corporation, by its attorneys, hereby responds to the petitions for reconsideration filed by the City of Tallahassee, Florida, Continental Cablevision, Inc. and Cox Communications, Inc. to the Commission's Sixth Order on Reconsideration ("Going Forward Rules").¹

I. BACKGROUND

A. The April 1993 Order

In its April 1993 Report and Order,² the Commission addressed the status of *a la carte* offerings, including services unbundled from existing tiers and the discount packaging of such services. At that time, the Commission stated that "[a

¹Sixth Order on Reconsideration, Fifth Report and Order and Seventh Notice of Proposed Rulemaking in MM Docket No. 92-266, 93-215, FCC 94-286 (released November 18, 1994).

²Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) ("April 1993 Order").

la carte] discounts would benefit the consumer" and that discouraging such arrangements through regulation "would not serve the purposes of the Cable Act and might be counterproductive."³ Thus, the Commission made clear that such unbundling and discounting did not violate the Cable Act. Subsequently, it confirmed that "restructuring program offerings to provide more *a la carte* services is not per se undesirable," and found that any incentive to avoid regulation by unbundling services "is created by the statute itself."⁴

Thus, at the time that many cable operators were introducing new *a la carte* options in September 1993, cable operators, including Adelphia, had every reason to believe that unbundling the maximum number of channels actually promoted choice and thus was consistent with the Commission's realistic option standard and with Congressional statements encouraging unbundling. Specifically, the Commission had concluded that, absent some extraordinary circumstances, *a la carte* restructuring would not be characterized as an evasion of the FCC's regulatory scheme and had established a "realistic choice" test for assessing the bona fide status of such offerings. None of the Commission's statements contained a warning or even a suggestion that there was any limit on the number of channels that could be migrated to an *a la carte* package.

³April 1993 Order, paras. 327-329.

⁴First Reconsideration Order, para. 35.

B. The March 1994 Order

On March 31, 1994, a year after adopting its April 1993 Order -- and seven months after cable operators, including Adelphia, implemented its rate and service restructuring -- the Commission reaffirmed that collective offerings of *a la carte* channels were exempt from rate regulation, so as to "afford[] operators an opportunity to enhance consumer choice by making programming more affordable and more widely available." Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) ("Second Recon. Order") at ¶ 194. The Commission, however, also reiterated concerns that, in some cases, restructured service offerings might constitute an evasion and/or not satisfy the realistic option test. Consequently, the Commission announced fifteen "interpretive guidelines" for use in "expeditiously" determining whether an operator's collective offering of *a la carte* channels should be deemed an evasion and/or an unrealistic service offering. On their face, many of these guidelines had nothing to do with the realistic option test set forth in the Commission's April 1993 Order.

Following the release of the Second Recon. Order, confusion regarding assessment of *a la carte* packages mounted in the cable industry.⁵ Moreover, it

⁵On June 17, 1994, after carefully reviewing the Second Recon. Order, Adelphia submitted a 20-page inquiry (plus attachments) to Meredith Jones, Chief of the Cable Services Bureau, requesting clarification of the fifteen guidelines, both generally and as applied to Adelphia. No response was ever forthcoming.

quickly became apparent that the Commission was having difficulty achieving a practical application of the factors in assessing *a la carte* service offerings.⁶

C. The November 1994 Order

In its recent Going Forward Order, the Commission candidly acknowledged it had created confusion regarding the application of its *a la carte* rules. In direct contrast to earlier pronouncements, the Commission held that operators could not offer unregulated packages of *a la carte* and services, regardless of the presence of realistic choice. It also adopted a rule allowing operators to treat "small" packages of *a la carte* channels previously carried on the basic tier ("BST") or cable programming service tiers ("CPST") as New Product Tiers ("NPT") services. Although the Commission did not define what would constitute a "small" package of *a la carte* services, the Cable Services Bureau, in a series of "Letter of Inquiry" rulings, has accorded NPT status to packages containing less than eight migrated channels. The Commission's rules only allow less than eight migrated channels to be treated as part of an NPT if the restructuring occurred between April 1, 1993 and September 30, 1994.

II. PETITIONS FOR RECONSIDERATION

In their petitions for reconsideration, both Cox and Continental advocate the adoption of a rule allowing all cable operators to migrate some number of programming services to an NPT in the future. While Continental and Cox appear

⁶See "FCC to Cable: Sit Tight On *A La Carte*," Cable World, July 4, 1994, at page 1 (indicating that Cable Services Bureau "is having difficulty developing consistent policy on *a la carte* offerings.")

to have similar goals, they approach the need for such reconsideration differently. Continental's petition points largely to the competitive economic disadvantage it alleges it will suffer in the capital market if it is not allowed the same opportunity as other cable operators to migrate channels to NPT. Continental indicates it did not employ *a la carte* packages at the time of service restructuring in September 1993, and argues that it is unfair for the Commission not to give all operators the opportunity to create NPTs containing a small number of existing channels.

Cox makes essentially the same case as Continental but focuses its arguments quite persuasively on the importance for new programmers to have the benefit of some number of existing channels as a foundation for a cable system's NPT. Cox points out that the failure to allow all cable operators to "migrate" some number of channels to the NPT will severely limit the likelihood of such new services being successful since few subscribers will purchase NPTs of services that include only unknown programming.⁷ Cox recommends that the Commission should (1) return to the position taken on September 1, 1993 that discounted *a la carte* packages are not subject to rate regulation if there is a realistic choice to

⁷Some systems that have not added many established services to date might be successful in marketing NPTs that contain services new to the system with established brand names. But the cable operators, such as Adelphia, that already have built large capacity systems and provided their subscribers with virtually all of the established services are prejudiced by the absence of such services in starting an NPT.

purchase individual channels, and (2) allow NPTs to contain some number of migrated services.⁸

Adelphia agrees with Cox and Continental that, at a minimum, the Commission should revise its rules regarding the establishment of NPTs containing migrated services. At the outset, Adelphia agrees with Cox that the Commission misinterpreted the Cable act in concluding that all discounted packages of *a la carte* services are subject to regulation as CPSTs. Beyond this fact, Adelphia submits that the Commission erred in limiting NPT status established under section 76.986(c)(ii) only to cable operators who migrated "a small number of channels" to *a la carte* packages. In reality, the number of services migrated from a tier has no relation at all to the presence or absence of reasonable subscriber choice. It was completely arbitrary for the Commission to establish eligibility for NPT status retroactively based on the number of migrated channels in *a la carte* packages.

⁸ The City of Tallahassee, on the other hand, argues that no cable operator should be allowed to treat an *a la carte* package containing any migrated channels as an NPT both prospectively and for calculating refund liability. According to Tallahassee, it was clear from the start that migrating any channels to *a la carte* was an evasion. Tallahassee's position simply ignores the fact that, in its April 1993 Order, the Commission expressly rejected a franchising authority's argument that migrating a channel from a regulated tier to an *a la carte* offering was per se evasive. April 1993 Order at n. 1105. Moreover, the clarity which Tallahassee purports to find in the Commission's initial declarations is belied by the fact that other franchising authorities have determined that the establishment of unbundled packages of *a la carte* service offerings serves the public interest. In short, there is simply no rationale for Tallahassee's position. Indeed, if anything about the Commission rules appeared clear in September 1993, it was that cable operators could initiate *a la carte* packages on an unregulated basis without any stated limitation on migrated channels.

Even if the Commission insists on limiting the number of migrated channels that can be included in an NPT, the rules should be changed to allow such migration by all operators prospectively. As indicated above, new program services historically have been allowed to develop by giving subscribers an opportunity to gain exposure to them in packages that include established services with significant viewership. Moreover, Adelphia submits that any rule permitting prospective migration should clarify the following issues.⁹

Adelphia believes that both Continental and Cox intended to include within their proposals those cable operators who migrated channels in the period governed by Section 76.986(c)(ii). Accordingly, the Commission should make clear that cable operators who previously migrated fewer than eight channels should be allowed to migrate additional channels. Similarly, other operators, including Adelphia, who migrated more than seven channels should, at the very least, be allowed to restructure their service offerings to retain up to seven migrated services as an NPT.¹⁰

In addition, Adelphia believes that the Commission should make clear that cable operators entitled to offer for the first time or retain a small number of migrated channels on an NPT will not be required to affirmatively remarket their

⁹Adelphia submits as Attachment A a proposed rule change to achieve the changes it proposes in these comments to the petitions for reconsideration.

¹⁰Under such an approach, those cable operators that removed more than seven channels would be allowed to retain seven channels as a NPT and either return the remaining channels to the tier from which they came or to make them available as a distinct tier of service. Moreover, refund liability would be calculated without calculating the permissible NPT channels as regulated services.

service offerings to existing subscribers. As the Commission has held, restructuring to achieve such a division of channels from one or more existing tier(s) to an NPT does not constitute a fundamental change in the services being provided. Therefore, neither the tier(s) from which the services are migrated nor the resulting NPT is required to be affirmatively marketed.

Finally, Adelphia believes that, although the Commission's definition of "small" number of existing channels permitted to be migrated to an NPT should serve as a floor, a franchising authority and the cable operator should be permitted to mutually agree to increase existing channels on an NPT (so long as the operator makes such channels also available on an individual *a la carte* basis). Such agreements not only would govern the calculation of BST rates by the franchising authority, but also of CPST rates by the Commission upon any subscriber complaint.

CONCLUSION


In light of the foregoing, Adelphia urges the Commission to reconsider its Going Forward Order and find that (i) *a la carte* packages are not subject to regulation, (ii) all cable operators should be allowed to offer up to seven existing services as a New Product Tier, and (iii) cable operators and franchising authorities may mutually agree to include additional existing channels within the NPT if all

such migrated channels remain available on an individual *a la carte* basis.

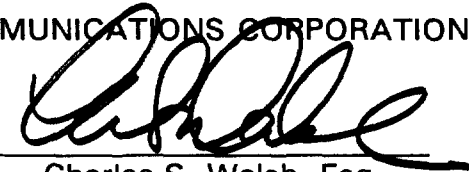
Respectfully submitted,

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ATTACHMENT A

Section 76.986 . . .

- (c) Collective offerings of per channel offerings may be treated as New Product Tiers if
 - (i) the collective offerings meet the conditions set forth in Section 76.987;
 - (ii) the collective offerings were created after April 1, 1993 and contain no more than seven channels offered to subscribers on a PST or CPST prior to October 1, 1994; or
 - (iii) the collective offerings were created between April 1, 1993 and September 30, 1994 and contained eight or more channels offered to subscribers on a BST or CPST prior to the creation of the collective offerings, in which case up to seven of the channels may be treated as a New Product Tier as of the date the collective offering was created.


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Reconsideration Petitions was served on the 3rd day of February, 1995, via first-class mail, postage prepaid upon the following parties:

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